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September 22, 1997

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

CC 95-185

Re: In the matter Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Caton:

Enclosed for filing in the above-captioned proceeding please find an original and four copies of "MCI Telecommunications Corporation's Opposition to U S West's Request for Stay Pending Judicial Review." Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jodie L. Kelley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

MCI TELECOMMUNICATIONS CORPORATION'S OPPOSITION TO U S WEST'S REQUEST FOR STAY PENDING JUDICIAL REVIEW

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EXECUTIVE SUMMARY

U S West seeks to stay pending judicial review this Commission's decision to refuse to reconsider that part of its earlier Local Competition Order that required incumbent local exchange carriers ("ILECs") "to provide unbundled access to shared transmission facilities." The regulation U S West seeks in particular to stay -- 47 C.F.R. Section 51.319(d) -- has been in effect since August 1, 1996, and was the subject of previous unsuccessful ILEC stay motions before both the Commission and the 8th Circuit. The ILECs, including U S West, also previously (and unsuccessfully) petitioned the 8th Circuit to overturn this same regulation.

As this history suggests, the instant motion is frivolous. Shared transport is critical to developing competition through combinations of unbundled network elements. U S West, along with other ILECs, has chosen to make repeated meritless challenges to the Commission's Order rather than allow facilities-based competition to develop. The Commission's shared transport ruling is no longer a matter for fair dispute: its decision (and the subsequent decision not to reconsider that decision) was a reasonable -- if not the only reasonable -- interpretation of the 1996 Act. Neither does U S West satisfy any of the other relevant considerations that would warrant a stay.

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MCI TELECOMMUNICATIONS CORPORATION'S OPPOSITION TO U S WEST'S REQUEST FOR STAY PENDING JUDICIAL REVIEW

MCI Telecommunications Corporation ("MCI") opposes U S West, Inc's ("U S West") request that the Commission grant a stay of its Reconsideration Order[1] pending judicial review of that order.

INTRODUCTION

U S West seeks to stay pending judicial review this Commission's decision to refuse to reconsider that part of its earlier Local Competition Order[2] that required incumbent local

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration, FCC 97-295 (rel. Aug. 18, 1997) ("Reconsideration Order").

[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, (rel. Aug. 8, 1996) ("Local Competition Order").

exchange carriers ("ILECs") "to provide unbundled access to shared transmission facilities."[5] The regulation U S West seeks in particular to stay -- 47 C.F.R. Section 51.319(d) -- has been in effect since August 1, 1996, and was the subject of previous unsuccessful ILEC stay motions before both the Commission and the 8th Circuit. The ILECs, including U S West, also previously (and unsuccessfully) petitioned the 8th Circuit to overturn this same regulation.

As this history suggests, the instant motion is frivolous. Shared transport is critical to developing competition through combinations of unbundled network elements. U S West, along with other ILECs, has chosen to make repeated meritless challenges to the Commission's Order rather than allow facilities-based competition to develop. The Commission's shared transport ruling is no longer a matter for fair dispute: its decision (and the subsequent decision not to reconsider that decision) was a reasonable -- if not the only reasonable -- interpretation of the 1996 Act. Neither does U S West satisfy any of the other relevant considerations that would warrant a stay.

PROCEDURAL HISTORY

1. The Local Competition Order. In its Local Competition Order, in the course of applying its expert understanding of the Act's unbundling requirements, the Commission required ILECs to "provide access to dedicated and shared interoffice facilities as unbundled network elements." Local Competition Order ¶ 429. U S West's protests to the contrary notwithstanding, the Local Competition Order could not have been more clear about the precise nature of the obligation to provide shared transport. See 47 C.F.R. Section 51.319(d) (defining "interoffice transmission facilities" as "incumbent LEC transmission facilities dedicated to a particular

[5]Local Competition Order at ¶ 440; 47 C.F.R. § 51.319(d).

customer or carrier, or shared by more than one customer or carrier," and then requiring the ILEC to "[p]rovide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier."). Id. Not only is this definition precise and unambiguous, but in defining the kinds of transport that ILECs had an obligation to unbundle, the Commission explicitly adopted as a model the different kinds of transport that are available and tariffed for resellers using interstate transport, Local Competition Order ¶ 428, including, in particular, leased shared transport: interstate transport across facilities also used to carry the wholesaler's retail traffic, routed through the wholesaler's switches pursuant to instructions contained in the software of the switching tables, available on a usage-sensitive basis.

2. Proceedings Before The Eighth Circuit. Several ILECs immediately sought to stay the unbundling rules, including the shared transport regulation, at the Commission and then at the 8th Circuit. See, e.g., Cincinnati Bell Petition for Stay before the FCC at 10; SNET Motion for Stay and Expedited Review before the 8th Circuit. These motions to stay the non-price portions of the Commission's orders were denied, and the non-price regulations, including the shared transport regulation at issue here, have remained in effect since August 1, 1996.

In the 8th Circuit, the ILECs continued to press their objection to the FCC's unbundling rules, including the shared transport rule. U S West and other ILECs petitioned the Eighth Circuit to overturn all subsections of Section 51.319, including the shared transport provision. See Brief for Petitioners Regional Bell Cos. and GTE No. 96-3321 (8th Cir. Nov. 18, 1996) ("GTE/BOC Br.") at 81. In their brief, the ILECs advanced the same set of arguments that U S

West continues to make here. First they argued that the FCC had allegedly defined "'network elements' in an impermissibly broad manner" to include "services." GTE/BOC Br. 53, see also id. at 52-53. That allegedly overbroad definition, coupled with the Commission's combination rules, was then said to have negated the Act's resale provisions in violation of the Congress' intent "that the resale provisions, not the unbundling requirements, control where the incumbent's finished telecommunication services are at issue." Id. at 66. Finally, the ILECs asserted that the Commission's unbundling rules unfairly allowed competitors to undercut ILECs' prices to business customers, which in part reflected universal service subsidies. Id. at 67. Thus, U S West and the other ILECs concluded that "[t]he FCC should not be permitted to nullify Congress's intended distinction between network elements and finished services subject to resale merely by redefining network elements to include existing LEC retail services." Id. at 69.

The Eighth Circuit rejected each of these arguments and declined to vacate the Commission's shared transport regulation. Iowa Utilities Board v. FCC, No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997) (herewithin citing to slip op. and Westlaw). In particular, it rejected U S West's "narrow interpretation of the definition of 'network element,'" Id. at 131, 1997 WL 403401 * 19, finding that "the FCC's determination that the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference." Id. at 132, 1997 WL 403401 * 20. As the Court explained:

> Simply because these capabilities can be labeled as 'services' does not convince us that they were not intended to be unbundled as network elements. [The Act's resale provisions are not] the exclusive means through which a competing carrier may gain access to such services. . . . We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either

unbundling or resale." Id. at 133-134, 1997 WL 403401 * 21.

The Court also rejected the ILECs' argument that FCC rules allowing competitors to purchase "services" at cost-based element prices violates legislative intent and place ILECs subject to universal service obligations at an unfair disadvantage. Slip op. at 144-45, 1997 WL 403401 ** 26-27. The Court observed that competitors who provide service through elements purchased from ILECs face increased risks not faced by resellers, id., and that the ILECs' concerns about their universal service obligations were being addressed directly through universal service reform. Id. at 145, n.34, 1997 WL 403401 * 32 n.34. Accordingly, the Court found that the Commission's unbundling rules located at 47 C.F.R. § 51.319, including the shared transport rule, were a reasonable interpretation of the 1996 Act, entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), and it declined to vacate those rules. Slip op. at 153 n.39, 1997 WL 403401 * 32 n.39.

3. Petition To Reconsider the Commission's Local Competition Order. While petitions for review were pending before the 8th Circuit, a coalition of ILECs filed a petition asking the Commission to clarify its requirement that ILECs provide competitors shared transport. In subsequent ex parte submissions filed by individual ILECs (including, in particular, U S West and Ameritech), precisely the same arguments were made that had been considered and rejected by the Commission, and that were then under consideration by the 8th Circuit: that the Commission had required ILECs to unbundle a "service," not an "element," and that such "sham unbundling" allows competitors to avoid the Act's resale pricing requirements.

After the 8th Circuit issued its decision, the Commission denied the ILECs' petition for reconsideration of the Commission's Local Competition Order, reasserting the same policy and

statutory justifications it had first enunciated in that earlier Order.[4] The Commission began by rejecting the suggestion that there was anything ambiguous about the relevant aspects of its previous Local Competition Order. Reconsideration Order ¶ 22. In particular, the Local Competition Order "expressly required incumbent LECs to provide access to transport facilities 'shared by [multiple] carriers,' . . . includ[ing] the incumbent LEC," id., and "does not support the claim advanced by Ameritech that a shared network element necessarily is shared only among [CLECs], and is separate from the facility used by the incumbent LEC for its own traffic." Id. Additionally, the Commission stressed that "the Local Competition Order was not ambiguous as to an incumbent LEC's obligation to offer access to the routing table resident in the local switch to requesting carriers that purchase access to the unbundled local switch." Reconsideration Order ¶ 23.

The Commission then reiterated the responses it had given in the Local Competition Order to the various arguments marshaled by the ILECs against considering shared transport an unbundled network element. Thus, the Commission repeated that it is not the case that network elements must be physically discrete objects wholly dedicated to a particular user. Any number of network elements, including signaling, call-related databases, and switching, are not dedicated to

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[4]At the same time, the Commission took the opportunity to "more clearly define" certain aspects of the obligation to provide shared transport that were not made explicit in the Local Competition Order. Reconsideration Order at ¶ 24 (identifying portions of the network that must be made available on a shared basis, and specifying that competitors may use shared transport to provide exchange access service to IXCs when these competitors also provide local service to the same customer). See also Reconsideration Order at ¶¶ 60-61 (asking for comments on how to treat the use of shared transport for access services when the CLEC is not the local service provider). These clarifications are not the subject of U S West's stay application, which is concerned only with those parts of the Reconsideration Order that reiterate the definition of shared transport set out in the Local Competition Order and restate the Commission's conclusion that shared transport is a network element.

a particular user, Reconsideration Order ¶ 41, and many of these elements can only be used when bundled with other elements. Id. ¶ 42. Nor does this understanding of "network element" (which is in any event compelled by the statute) eliminate the statutory distinction between resale service and service through unbundled network elements. Purchasers of unbundled network elements take on risks that simply are not present for the reseller. Id. ¶ 47. For all of these reasons, the Commission declined to reconsider that portion of its Local Competition Order that concerned shared transport.

4. U S West's Request for a Stay. In this request for a stay pending judicial review, U S West reargues the same points it previously pressed before the Commission and the 8th Circuit. It observes that shared transport necessarily requires the CLEC to make use of both switching and transport elements (and, in particular, requires ILECs to make available the intelligence located in the routing tables entered into the switch's software). From this, U S West incorrectly concludes that shared transport is not an "element," but a "service" available only as part of a complete package of resold services, or, where available, pursuant to an access tariff. The Commission's contrary position allegedly reads the resale provisions out of the Act, U S West continues, because competitors will always choose to purchase switching and transport as elements at cost-based rates, rather than as a component of resold services. Thus, U S West argues (erroneously) that because of the universal service subsidies built into the ILECs' retail rates, shared transport unfairly allows CLECs to offer service to business customers based on cost-based rates, while the ILECs are forced to charge these same customers higher rates in order to be able to satisfy their universal service obligations.

ARGUMENT

A request for a stay of an agency order pending appeal is a request for extraordinary relief, and the movant bears the burden of proving that such relief is warranted. Under the familiar four-pronged test, a movant is not entitled to a stay unless it can show: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. See, e.g., Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, 11 FCC Rcd. 1754 (1996). U S West does not satisfy any prong of this test.

I. There Is No Likelihood That U S West Will Succeed In Vacating The Reconsideration Order.

A. U S West's Arguments Already Have Been Rejected By The Eighth Circuit.

In support of its request for a stay, U S West offers only a re-hash of arguments it unsuccessfully has made twice to the Commission and once to the Eighth Circuit. There is no reason to think that U S West will have any more luck as it shops these complaints around to other Courts of Appeals. To be sure, U S West claims that the Reconsideration Order proposes a "newly devised notion of 'shared transport,'" U S West's Request for Stay Pending Judicial Review (Stay Pet.) at 1, constituting an "abrupt reversal" of the unbundled transport rules contained in the Local Competition Order. Id. at 11. In particular, U S West asserts that "[b]efore the Reconsideration Order, unbundled transport facilities were understood" to be either

"dedicated facilities or capacity on a route-by-route basis," id. at 10, available only at a flat-rate price. Id.

But this "understanding" is nowhere to be found in the Local Competition Order, which defined "shared transport" in precisely the same manner as does the Reconsideration Order. As set out above, the Local Competition Order defined "shared transport" not, as U S West would have it, as the shared use of a discrete and identifiable segment of wire or fiber, but instead broadly as "use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier." 47 C.F.R. § 51.319(d). The Commission in turn defined "interoffice transmission facilities" not, as U S West would have it, as a discrete, identifiable segment of wire or fiber, but broadly as "ILEC transmission facilities." See Local Competition Order at ¶ 258 ("Carriers seeking . . . shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis").

Moreover, as the Commission has made clear since it first issued its Notice of Proposed Rulemaking, "shared transport" is defined in the same way the term had traditionally been understood in the long-distance access tariff. Local Competition Order ¶ 428. In that tariff, "shared transport" is defined, and has always been understood, to give resellers the right not only to lease discrete, identifiable segments of wire, but also to purchase capacity to move traffic on a minutes-of-use basis, from one point to another, through whatever combination of transport and switching the wholesaler moves its own retail long-distance traffic. See Transport Rate Structure and Pricing, CC Docket No. 91-213, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 5370, ¶ 2 (1993). The Local Competition Order was also explicit that the routing

instructions located in a switch's routing tables are part of what is purchased when a competitor purchases unbundled local switching, a network element that for that reason must always be purchased whenever shared transport is requested. Local Competition Order ¶ 412; Reconsideration Order ¶ 23. For all of these reasons it is frivolous for U S West to suggest that it was only in its Reconsideration Order that the Commission proposed a version of "shared transport" that could be characterized as a "service," incorporating not only identifiable segments of wire and fiber, but also transport, including the instructions embedded in the routing tables of the switch.

Nor has U S West marshalled any new arguments to support its crabbed view of its statutory obligation to unbundle its network. The claims U S West makes here -- that shared transport is a service not an element, that the Commission's regulation undermines the Act's resale provisions, and that this regulation undermines the ILECs' universal service obligation -- are the same claims U S West previously brought against the Commission's shared transport regulation last year when the Local Competition Order was published. As set out further below, other courts of appeals will surely treat these arguments in the same way they were treated by the 8th Circuit, and find that the Commission's shared transport ruling is a reasonable construction of the Act entitled to judicial deference. See Chevron, 467 U.S. at 842-845.

B. The Commission's Decision To Define Shared Transport As An Unbundled Network Element Is A Reasonable Construction Of The Act.

Section 251(c)(3) of the Act imposes on ILECs "[t]he duty to provide . . . nondiscriminatory access to network elements on an unbundled basis," and section 251(d)(2) requires the Commission, when issuing regulations under subsection (c)(3) to "consider, at a

minimum," whether access to proprietary elements is "necessary," and whether failure to provide access "would impair the [competitor's] ability . . . to provide the services that it seeks to offer." The Eighth Circuit has held -- and U S West does not here challenge -- that the Commission has the statutory authority to issue unbundling regulations, and has given these statutory terms a reasonable construction. Moreover, U S West does not challenge the Commission's determination that "the record provides no basis for withholding [shared transport] facilities from competitors based on proprietary considerations." Local Competition Order ¶ 446, Reconsideration Order ¶ 32. U S West does not argue that unbundling shared transport is technically infeasible, nor does U S West challenge the Commission's determination that new entrants would be impaired in their ability to provide local service if they were unable to make use of shared transport. Local Competition Order ¶ 441; Reconsideration Order ¶¶ 34-37. Instead, U S West's sole claim is that the Commission's determination that shared transport is a "network element," as opposed to a "service" that can be purchased only as part of a complete, end-to-end resale service offering, is an unreasonable interpretation of the statute.

U S West makes three related arguments: (1) "elements" must be dedicated to the specific use of one provider; (2) "elements" must be able to be used unattached to any other ILEC element; and (3) "elements" must be located in one contiguous identifiable physical space. Stay Pet. at 11. Because shared transport shares none of these characteristics, U S West asserts it is unreasonable for the Commission to define it as a network element.

As the 8th Circuit found, however, this "narrow interpretation of the definition of 'network element'" is foreclosed by the Act itself. Slip op. at 131, 1997 WL 403401 * 19. The Act defines "network element" broadly to mean "a facility or equipment used in the provision of a

telecommunications service," 47 U.S.C. § 153 (29), and defines "telecommunications service" broadly to mean "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153 (46). As the Eighth Circuit held, "given this definition, the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call." Slip op. at 131, 1997 WL 403401 * 20. Instead, the "FCC's determination that the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference." Slip op. at 132, 1997 WL 403401 * 20.

Moreover, as the 8th Circuit also observed, the Act defines "network element" to include "databases, signaling systems, and information sufficient for billing and collection." This "substantially broadens the definition of 'network element.'" Slip op. at 132, 1997 WL 403401 * 20. This broad definition led the Court "to agree with the Commission's conclusion that operator services, directory assistance, caller I.D., call forwarding and call waiting are network elements that are subject to unbundling." Id. at 133, 1997 WL 403401 * 21.

Of course, each of these network elements fails U S West's proposed test in precisely the same manner that shared transport fails the test. These elements "reside" in databases necessarily common to all potential users, they are not discrete physical objects, and they cannot be physically separated from the switch in which they reside. The Commission and the Eighth Circuit are plainly correct that since Congress declared databases, signalling systems and other "information" to be "network elements," it is the test proposed by U S West, and not the Commission's regulation, that is unfaithful to the statute.

Nor is there anything to U S West's complaint that the Commission's understanding of

"network element" eviscerates the Act's resale provisions. To the contrary, the Eighth Circuit was correct that "[s]imply because these capabilities can be labeled as 'services' does not convince us that they were not intended to be unbundled as network elements. [The Act] does not establish resale as the exclusive means through which a competing carrier may gain access to such services." Slip op. at 133, WL 403401 ¶ 21. Congress created three distinct routes of entry into the local market: pure facilities-based service, resold service, and combinations of network elements. Congress made no effort to steer potential competitors into one or the other of these entry vehicles, and it is pure fantasy for U S West to propose that the Act's resale provisions were designed to protect universal service subsidies and foreclose certain types of entry through combinations of unbundled network elements. Indeed, as the 8th Circuit held in rejecting U S West's previous iteration of this argument, Congress addressed the issues surrounding universal service head-on by mandating universal service reform. Slip op. at 145 n.34, 1997 WL 403401 * 32 n.34. Nor did Congress try to predict whether potential competitors would find resale a more or less attractive entry option than entry though the purchase of unbundled network elements, or construction of their own facilities. To the contrary, Congress created the three entry routes and then left it to market participants to determine which route or routes of entry would be most profitable under which set of circumstances.

In any event, as both the Commission and the Eighth Circuit recognized, there are different benefits and risks that attach to each entry option. Reconsideration Order ¶¶ 16 & n.58, 47; Eighth Circuit decision, slip op. at 144, 1997 WL 403401 * 26. In particular, a CLEC purchasing resold services takes no risk relating to the nature of the phone service it is able to sell or the number of customers it is able to attract. A CLEC purchasing shared transport, on the

other hand, must necessarily also purchase unbundled switching, and purchase at a flat-rate all of the features and functionalities of the switch. The purchaser's ability to make a profit may thus well depend upon its ability to sell to customers whatever enhanced services those features and functionalities make available. Reconsideration Order at ¶ 47. Similarly, a competitor that chooses to offer a flat-rate priced retail service through a combination of network elements runs a risk not faced by a reseller that its retail customers "will generate substantial switch usage costs on local calls (free usage), without generating significant interLATA traffic and associated revenues." Id. at ¶ 16 n.58.

U S West's answer to this is that these are risks associated with unbundled local switching, not shared transport. Stay Pet. at 14. But this is mere word-play: as the Commission determined, and as U S West well knows, a CLEC that purchases shared transport must also purchase unbundled local switching, and so must accept the risks that necessarily accompany that purchase. Reconsideration Order ¶ 47.[5]

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[5]U S West also complains that "the risk associated with taking vertical features is insignificant," because the incremental cost associated with such features "may" be small. Stay Pet. at 14, quoting Local Competition Order at ¶ 414. But, "may" aside, risk is measured not only by the cost expended, but also by the benefit anticipated. A provider that calculates that it can make a profit only by offering a feature-rich service through unbundled network elements runs a risk that it will not be able to sell such enhanced services. A reseller runs no such risk.

U S West makes much of the fact that the 8th Circuit identified one of the risks facing providers who offer service through unbundled network elements to be the risk of bearing the cost of combining those elements. Stay Pet. at 13-15, citing Slip op. 141, 1997 WL 403401 * 25. U S West argues that the Reconsideration Order fails to acknowledge this risk, because it does not require a competitor to pay to combine shared transport with unbundled local switching, as shared transport comes combined with unbundled local switching, and so does not need to be combined by the ILEC's competitor. U S West concedes, however, that the 8th Circuit itself has acknowledged this fact by preserving 47 C.F.R. subsection 51.315(b) of the Commission's combination regulation, but it insists that this was an error by the Court that it is seeking to correct through a petition for rehearing. Stay Pet. at 15 n.12.

In sum, the Commission's ruling that shared transport is a network element is at the very least a reasonable construction of the Act to which a reviewing court will defer.

II. All Other Relevant Considerations Weigh Against Granting A Stay.

A. U S West Has Not Shown Irreparable Injury.

In its stay request, U S West does not, and cannot, demonstrate that it will suffer irreparable harm absent the grant of a stay. U S West claims that it will be injured by the Commission's shared transport rule because new entrants will purchase shared transport at cost-based rates, rather than "paying the wholesale rates specified by the Act's resale provisions . . ." Stay Pet. at 16. This, U S West claims, will harm its revenue base by allowing new entrants to reduce prices and entice away its customers, and by reducing the amount of universal service subsidy it will receive. Id. at 16-18. In other words, U S West claims that it will suffer irreparable harm absent a stay because it will lose money.

It is, however, "well settled that economic loss does not in and of itself, constitute irreparable harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1984). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Virginia

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Whatever inconsistencies U S West purports to find in the 8th Circuit's order are properly addressed in its petition to that Court -- they hardly justify issuance of a stay here. In this regard, we note that only an entrenched monopolist could believe that the Act must be understood to require ILECs to charge their rate-payers the cost of breaking apart elements that are already combined so that they in turn can force would-be competitors to pay to recombine those same elements. In any event, the Court's statement that a CLEC that provides service through combinations of unbundled network elements bears the risk of whatever costs are associated with the combining of those elements is completely consistent with the Court's (and the FCC's) understanding that as to some elements, such as the switch and shared transport, there are no such costs because the elements by their nature travel together and so do not need to be combined when they are ordered by a CLEC.

Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added). U S West's claim that it will lose revenue as a result of competition is not a claim of irreparable harm.

U S West attempts to avoid this failure of proof by citing cases finding the irreparable harm prong satisfied where a movant demonstrates "harm to [its] relationships with its customers." Stay Pet. at 18. But U S West has made no attempt to demonstrate that its relationship with its customers will be harmed. It has argued only that the increased competition that will ensue when competitive carriers enter the marketplace will cause some of its customers to choose competitors for the provision of local service. This, however, merely amounts to a complaint that with the advent of competition U S West will lose its monopoly status. Far from being an irreparable harm, this is the very state of affairs the 1996 Act set out to create.

Because U S West has made no serious argument that it will suffer irreparable harm absent a stay, its request for a stay should be denied.

B. Granting A Stay Would Cause Substantial Harm To New Entrants, And To The Public's Interest In Competitive Local Telephone Markets.

Competition benefits consumers and is therefore in the public interest. U S West does not contest the Commission's finding that competition will be impaired unless competitors have access to shared transport. In particular, the Commission expressly found -- and U S West does not deny -- that if carriers could not purchase shared transport as an unbundled element, this "would significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market." Reconsideration Order at ¶ 34. Even "[a]n efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities." Id.

at ¶ 34, quoting Local Competition Order at ¶ 420. A stay would preclude new entrants from gaining access to this essential facility and further delay the advent of competition in local markets.

U S West does not address the harm to the public interest in the form of reduced competition a stay would inevitably cause. Instead, it argues that a stay would be in the public interest because access to shared transport would "destroy the viability of state universal service plans . . ." Stay Pet. at 18. Even if this hyperbolic assertion were accurate -- and it is not -- as the 8th Circuit observed in upholding the Commission's unbundling rules, the Commission is reviewing the issue of universal service in a separate docket, and any concerns about the impact of a given policy on universal service is properly addressed in that forum. Slip op. at 145 n.34, 1997 WL 403401 * 32 n.34. U S West cannot use its unfounded complaints about the impact of the Commission's policies on universal service funding to bootstrap its otherwise meritless request for a stay. The public interest would be greatly harmed by the stay sought by U S West.

CONCLUSION

U S West's request for a stay should be denied.

Respectfully submitted,

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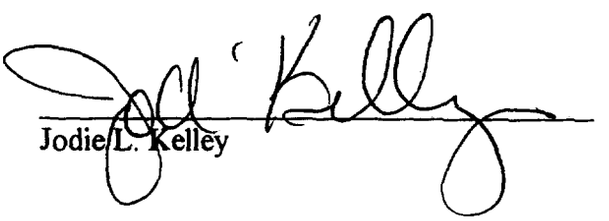
September 22, 1997

CERTIFICATE OF SERVICE

I, Jodie L. Kelley, do hereby certify that on this 22nd day of September, 1997, I have caused a copy of "MCI Telecommunications Corporation's Opposition to U S West's Request for Stay Pending Judicial Review" to be served via messenger or overnight mail upon the persons listed on the attached service list.



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